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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SAFEWAY STORES INCORPORATED,
Petitioner,

VS.

RONI K. DOGHERRA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW[1]

1. Whether the making of a false statement during the investigation of a grievance should be held to constitute employer repudiation of the grievance procedures of a collective bargaining agreement where the person making the false statement was a member of the Union investigating the grievance and was not authorized by the employer as having authority to adjust grievances or otherwise participate in the grievance procedure; and where the making of the false statement caused the Union to drop the grievance?

2. Whether the employer should be held accountable for such a false statement where that statement was made by a member of the Union to which the statement was made and when the statement was made without the employer's knowledge, consent or authorization?

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[1]The caption of the case in this Court contains the names of all parties. Emphasis in matter quoted herein has been supplied.

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No.

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OCTOBER TERM, 1982

SAFEWAY STORES INCORPORATED,
Petitioner,

VS.

RONI K. DOGHERRA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Roni K. Dogherra v. Safeway Stores Incorporated, Nos. 80-4178 and 81-4351 below.

OPINIONS BELOW

The opinion of the Court of Appeals filed June 21, 1982 is reported in ..... F.2d ..... and 110 L.R.R.M. 2790. A copy is printed as Appendix A. An order denying Safeway's Petition for Rehearing and Rehearing En Banc is printed as Appendix B. The District Court's "Order Denying Motions for Reconsideration and For Certification of Issue" and "Judgment and Findings of Fact and Conclusions of Law" are printed as Appendices C and D, respectively. The "Order Denying Motions for Reconsideration and For Certification of Issue" is reported at 484 F.Supp. 396.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals rendered its decision and filed its opinion on June 21, 1982 (APP. A). A timely Petition for Rehearing and Rehearing En Banc was denied (APP. B). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(1). The District Court had jurisdiction under 29 U.S.C. § 185 and 28 U.S.C. § 1331(a).

STATUTORY PROVISIONS

29 U.S.C. § 185 reads in relevant part:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> . . . .
>
> (e) For the purposes of this Section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the quesion of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

This case arose under Section 301 of the Labor-Management Relations Act (hereinafter "Act" or "LMRA") (29 U.S.C. § 185). Originally filed in Superior Court in and for the County of Santa Cruz, California, the action was removed by Petition and Amended Petition for Removal on December 22 and 29, 1977. Essentially, the Plaintiff below, Dogherra, alleges that she was terminated wrongfully

from her job at Safeway. She claims that in December 1975 she was granted a six-month leave of absence and that a few days prior to the expiration of the leave she returned to the Safeway Store where she had been employed and informed Arthur Martinez, the Assistant Manager, and a member of the same Union and bargaining unit as Dogherra, of her readiness to return to work. Safeway contends that Martinez was authorized to receive Dogherra's notice of her intention to return to work because the Store Manager, a member of Safeway's management, was away when Dogherra claims she returned.

Dogherra claims that a few weeks later she was discharged from Safeway on the ground that she failed to return prior to expiration of her leave. Thereafter, she claims to have filed a grievance with her Union over the allegedly wrongful discharge. The nub of her case and of this appeal is her further claim that Martinez lied to the Union during its investigation of the grievance by telling the Union that Dogherra had not sought reemployment prior to the expiration of her leave. Dogherra claims that as a result of this lie, the Union dropped the grievance, leaving her without a remedy for the allegedly wrongful discharge.

After the Union dropped the grievance, Dogherra approached the President of her Union, Retail Clerks Union Local 839 (hereinafter "Union" or "Local 839") and asked him to reopen her grievance. The grievance was reopened in February 1977, and following an evidentiary hearing, Arbitrator Sam Kagel ruled that Dogherra's grievance was not arbitrable.[1] In so ruling, Arbitrator Kagel stated:

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[1]Arbitrator Kagel's "Opinion and Decision" is reprinted as Appendix E.

> It must be accepted that when there is a grievance and a Board of Adjustment meeting is requested and such request is granted and the Union then drops the case, it cannot then be resurrected some five months thereafter. Such a practice would be violative of the principle that is behind all provisions dealing with the adjustment of grievances; i.e., that they should be completed within a reasonable time, that the Employer have the right to rely on the withdrawal of the case. It must be found that Ms. Dogherra was, in fact, informed that the case was not proceeding and the reason therefor, namely, her defense and she had talked to Martinez did not check out and that she had not supplied the Union with the necessary medical release.

App. E, p. A-33.[3] The collective bargaining agreement between Safeway and Local 839 provides that decisions of an arbitrator "shall be final and binding upon" the parties.

Approximately a year after Arbitrator Kagel made his decision, Martinez changed his story and told Union officials that he earlier had lied to them about Dogherra. There was no evidence adduced at the trial that following this meeting the Union attempted again to revive Dogherra's grievance.

The complaint in state court joined as Defendants Safeway, the Union, the Retail Clerks International Association, AFL-CIO, and thirty fictitious parties. Dogherra al-

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[3]There was testimony, both at the trial and at the hearing on Dogherra's grievance, from Union officials that Dogherra had been asked to provide her doctor's medical release to the Union so they could present it at a Board of Adjustment hearing that had been scheduled respecting her grievance. Dogherra never provided the medical release.

leged that Safeway had breached its collective bargaining agreement in terminating her, that the Defendant Unions had breached the duty of fair representation in connection with the processing of her grievance, and that the parties had committed various torts under California law. By first amended complaint filed February 20, 1979, Dogherra dropped all Defendants other than Safeway, and her state claims thereafter were dismissed upon Safeway's motion. The sole remaining claim against Safeway was for breach of the collective bargaining agreement. No allegations were left pertaining to any alleged breach of the duty of fair representation on the part of Local 839.

Relying on the state of the record and settled law of the Ninth Circuit Court of Appeals, Safeway in April 1979 moved for summary judgment on the ground that the court could not reach the question whether Safeway had breached the collective bargaining agreement by discharging Dogherra. Safeway relied on what it considered to be Arbitrator Kagel's final and binding arbitration decision rejecting the grievance for lack of timeliness and argued that this disposition was not reviewable. Dogherra opposed this motion, relying principally on the allegation that Martinez had lied when the Union was investigating the grievance. She urged the court to find that the grievance and arbitration procedure thereby was subverted and to rule that she be permitted to bring her breach of contract claim on the merits in federal court, notwithstanding its disposition in the earlier arbitration.

Safeway's motion was denied, and the district court ruled that Martinez' alleged lie could be imputed to Safeway if it were later found at trial that Martinez was Safe-

way's agent at the time he allegedly lied. The court also ruled that such conduct could constitute at least an implied repudiation of the grievance procedure so that the court would have jurisdiction to hear Dogherra's claim on the merits (App. C, pp. A-18-20).

There was no evidence adduced at trial that Safeway ever had actual knowledge of Martinez' lying or that it authorized or ratified the lie. Martinez' sole explanation for his conduct was that he believed Safeway did not want Dogherra as its employee. Likewise, no evidence was adduced that Martinez ever was authorized to adjust grievances or participate in the grievance procedure on Safeway's behalf or that the Union believed him to be so authorized.

Following the trial, the court found that Martinez had lied to representatives of Local 839, thereby causing the Union to drop Dogherra's grievance, that Safeway was "acting through its management representative, Arthur Martinez," when Martinez lied, and that the telling of the lie had prevented the "contractual machinery" from operating "within the minimum level of integrity, that Congress had anticipated when it put its blessings on private dispute settlement arrangements. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976)" (App. D, p. A-24).

The district court ordered Dogherra reinstated and compensated with backpay and other lost fringe benefits. The court also found that Safeway had acted in bad faith in pursuing the litigation and ordered Safeway to pay all of Dogherra's attorneys' fees (*id.* at A-25).

Safeway appealed, arguing that the district court had erred in finding that Martinez' lie had repudiated the griev-

ance procedure and in finding that the lie should be imputed to Safeway.[4]

The Court of Appeals held that "intentionally giving a false statement to Union investigators causing them to drop the grievance until after it was time-barred . . . constitutes fraud" and that such conduct was a repudiation of the arbitral process (App. A, p. A-7). The Court of Appeals, however, remanded the fraud issue to the district court because the lower court did not decide whether the fraud had been discoverable prior to the arbitration and did not state whether the fraud had been proven by "clear and convincing" evidence (*id.* at A-7-8). The Court of Appeals also found that when Martinez lied he was Safeway's agent:

> The agency is not necessarily vitiated even if Safeway did not tell Martinez to lie nor know what Martinez told the union investigators. As noted above, even acts specifically forbidden by the principal may be within the scope of the agent's authority. . . . Martinez stated that he understood that Safeway did not want Dogherra as its employee. He felt that lying to the union investigators would help attain Safeway's goal. He intended to further Safeway's interests. His conduct is therefore chargeable to Safeway (*id.* at A-4-5).

We discuss the treatment of the case by the Court of Appeals in greater detail in our elaboration of the reasons for granting the Writ, to which we now turn.

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[4]Safeway also appealed the district court's award of attorneys' fees and finding that Safeway had acted in bad faith when it pursued the lawsuit. The district court was reversed on these issues. Safeway also appealed the district court's finding that Martinez' lie had caused the Union to drop the grievance. The district court was affirmed on this issue. Neither of these issues are presented here for review.

REASONS FOR GRANTING THE WRIT

A. This Is a Case of Nationwide Impact Because the Opinion of the Court of Appeals Will be Interpreted as Opening the Door to Numerous Challenges of Arbitral Awards, Contrary to Settled National Labor Policy

Ever since this Court decided the *Steelworkers' Trilogy*,[4] final and binding arbitration has been the preferred means to resolve labor disputes. In connection with this policy, this Court ruled in *Vaca v. Sipes*, 396 U.S. 171, 185 (1967), that an employee may be excused from exhausting those procedures before proceeding to court on a breach of contract claim if the Union breached its duty to represent him fairly or if the employer engaged in "conduct [which] . . . amounts to a repudiation of those contractual procedures." The *Vaca* court also held that an employee "has no absolute right to have his grievance arbitrated . . . and that a breach of duty of fair representation is not established merely by proof that the underlying grievance was meritorious. . . ." *Id.* at 194-195.

The decision of the Ninth Circuit Court of Appeals that the finality of a grievance procedure can be undermined where one of the parties to it lied during the investigation of the grievance causing the other to drop it has vast implications.

Innumerable arbitrations obviously involve sharply disputed factual issues. The investigation and processing of a grievance will involve interviewing the witnesses and ultimately will result in a decision whether the grievance ought to be processed any further. Judgments as to credibility

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[4] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Emp. Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car. Corp.*, 363 U.S. 593 (1960).

necessarily will be made by the investigators and, if the grievance proceeds that far, by the Arbitrator.

That these judgments are entrusted to a *final and binding* arbitral process should hardly be open to question. *See generally* Elkouri & Elkouri, *How Arbitration Works*, p. 273 (3d ed. 1973). The result of the ruling of the Ninth Circuit Court of Appeals is that any time there are sharply disputed facts, with parties presenting differing versions of the critical events, the losing side *always* will have recourse to federal court claiming that the winner "lied" in its presentation, thereby subverting the process and permitting the court to review the merits of the grievance *de novo*. Safeway, of course, does not argue that every such case will be successful. However, each such case following the Ninth Circuit's ruling will be able to withstand early disposition, will necessarily require a trial on the merits (because there are sharply disputed facts; see Rule 56, Fed. R. Civ. P.), and will substantially burden the courts in a way never envisioned by Congress or by this Court when national labor policy was formulated and the narrow exceptions to the finality rule were drawn. As stated in Elkouri & Elkouri, "Arbitration is an avenue traveled by thousands, indeed millions, of industrial disputants." *Id.* at 797. As a result of the Ninth Circuit's decision, a dangerous new doctrine has been created for the reopening of arbitrable disputes after the arbitral process has run its course.

B. The Court of Appeals Holding that the Telling of a Lie During the Arbitral Process Constitutes a Repudiation Is in Conflict With the Law in Other Circuits and of This Court

There is no question that a repudiation of the arbitral process excuses a grievant from the finality of those procedures. *Vaca v. Sipes, supra.* The question in this case, how-

ever, is "What constitutes a repudiation?" Safeway respectfully submits that no court that ever has considered this issue has extended the doctrine as far as the Ninth Circuit Court of Appeals. Indeed, courts have rejected the proposition that employer conduct falling short of an outright refusal to proceed in accordance with the contract constitutes a repudiation sufficient to excuse the grievant from exhausting the contractual grievance procedures. *See e.g., Bettencourt v. Boston Edison Company,* 560 F.2d 1045, 1049 (1st Cir. 1977); *Boone v. Armstrong Cork Co.,* 384 F.2d 285, 292 (5th Cir. 1967); *Caruso v. Drake Motor Lines, Inc.,* 78 F.R.D. 586, 590 (E.D. Pa. 1978).

In *Rabalais v. Dresser Industries, Inc.,* 566 F.2d 518 (5th Cir. 1978), the employee alleged that his employer had repudiated the grievance procedure by its refusal to participate in it. While finding this allegation sufficient to withstand a dismissal, the Court found that it was not applicable in the case before it:

> The employer participated in the first three stages of the grievance process. At that point neither the employer nor the union sought the final step, arbitration. Rabalais argues that there was a repudiation because the employer did not consider the claim a proper subject of a grievance. *This argument, however, clearly confuses repudiation of the grievance procedure and a refusal to accept an employee's position with respect to a grievance. An employer can obviously take a stance contrary to that of the employee during the grievance process without being deemed to have repudiated that process.*

566 F.2d at 520.

Likewise, in *Robbins v. George W. Prescott Publishing Co., Inc.,* 457 F.Supp. 915 (D. Mass. 1978), *appeal dis-*

missed, 614 F.2d 3 (1st Cir. 1980), allegations of employer repudiation were made, including alleged refusal to rescind an improper discharge, bad faith use of the grievance procedure to precipitate the termination of the plaintiff, and lack of any intention on the part of the company to submit to the grievance procedure in good faith.

The district court held that these allegations "do not rise to [the level]" of repudiation (457 F.Supp. at 921):

> Analytically and temporally, acts by an employer which are alleged to be substantive breaches of a bargaining agreement . . . cannot also serve as anti-remedial acts constituting employer repudiation of the grievance and arbitration procedure established for the resolution of those earlier substantive breaches. . . . To hold otherwise would allow the repudiation exception to swallow whole the exhaustion requirement, since underlying substantive claims of breach of contract will always be at issue in § 301 cases. . . .
>
> Robbins' argument, which could be echoed by almost every § 301 plaintiff, that he is excused from resolving his claims through available contractual procedures because the Company has neither rescinded its actions, reinstated him, nor conceded that it has violated the contract, in no way establishes ignorance, obstruction or repudiation of the contract's remedial procedures by the Company. Those stances by the employer are simply consistent with the Company's position that Robbins was properly discharged.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 571, a case principally relied upon by both the district court and the Ninth Circuit Court of Appeals, this Court held that a grievant may not reopen his claim under Section 301 based on the alleged discovery of new evidence:

> Petitioners are not entitled to relitigate their discharge merely because they offer newly discovered

> evidence *that the charges against them were false and that in fact they were fired without cause.* The grievance process cannot be expected to be error-free.

Thus, Dogherra's contention that Martinez lied to her Union, even if true, is an insufficient ground for the Court to deny the force and effect of the decision of Arbitrator Kagel. In *Bridgeport Rolling Mills Company v. Brown*, 314 F.2d 885 (2d Cir. 1963), *cert. denied*, 375 U.S. 821 (1963), the Second Circuit Court of Appeals affirmed a judgment upholding an arbitrator's award despite the allegation that the grievant committed perjury during the arbitration hearing. The Court recognized that proof that the grievant perjured himself at the arbitration hearing does not imply that the award was procured by fraud. Thus, the Court denied the employer's effort to vacate the arbitration decision. In a *per curiam* decision, the Court stated:

> That the employer at the time his motion was presented to the District Court may have had, or may now have, sufficient evidence to justify a discharge of Brown for cause if he were now in the employer's employ is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination that the employer did not have just cause to discharge him in 1961.

314 F.2d at 885-886.*

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*The cases cited by the Ninth Circuit Court of Appeals in support of its conclusion that lying to Union investigators causing them to drop a grievance constitutes fraud and repudiation, *Shearson, Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981); *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Company*, 397 F.2d 594, 598 (3d Cir.) *cert. denied*, 393 U.S. 954 (1968); and *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951), at most hold that perjured testimony given during the arbitration hearing might be grounds for vacating an award. In the instant case, there was *no perjured testimony* given

Other Circuits have stopped short of applying the repudiation doctrine to conduct other than a refusal to participate in the process. The doctrine has been grossly extended in the instant case where a bargaining unit employee of Safeway, without knowledge of anybody else in the Company, took it upon himself to lie to his own Union during the investigation of a fellow member's grievance. That such conduct would be held to be *Safeway's* repudiation of the grievance procedure is contrary to established law in this Court and in other Circuits.

C. The Court of Appeals Finding That Martinez was Safeway's Agent Dangerously Intrudes on the Arbitral Process

In holding that Martinez' conduct properly was "chargeable to Safeway," notwithstanding the fact that Martinez was acting alone and on a subjective belief that he was helping attain the Company's alleged goal of eliminating Dogherra as its employee (a belief utterly unsubstantiated by the evidence), the Court of Appeals created a doctrine which dangerously erodes the finality of the grievance and arbitration process. The Court improperly applied common law agency principles without reference to the competing concerns of national labor policy.

Dogherra had the burden of proving agency as it related to the processing of grievances. In the absence of any evidence that Safeway authorized Martinez to process grievances, knew that Martinez was lying or caused him to do so, it is improper to impute Martinez' conduct to the Company.

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by Martinez during the arbitration hearing, at which he did not testify. The remedy for such fraud is a reopening of the arbitration, something which Dogherra never has sought.

The Court of Appeals' conclusions as to agency should have been tempered by the holdings of this Court in *Hines* and *Vaca* and by the sound reasoning of other Courts of Appeals as to what *conduct* on the part of one of the *parties* constitutes a repudiation of the grievance and arbitration procedure. If, as held in the cases cited in the immediately preceding section, a repudiation requires some conduct which constitutes a rejection of the process, how can Martinez' behavior, which involved no conduct on the part of Safeway, but only at worst *his* subjective and unsubstantiated evaluation of the Company's desires, be imputed to the Company for purposes of finding that *it* repudiated the grievance process?

As demonstrated in *Vaca* and the other Circuit Court decisions following it, the repudiation doctrine was designed to be narrow in scope. It was not designed to permit the conduct of an employee of a company, albeit one in the bargaining unit, to bind that company when such conduct was not known to it, ratified by it, or caused by it.

Until this case, there has been no reported decision where anything other than overt conduct on the part of the repudiating party has been imputed to it for purposes of finding that a repudiation of the grievance procedure has occurred. The Ninth Circuit Court of Appeals has departed from this standard, and it is appropriate for this Court to resolve this conflict.

CONCLUSION

In the Article Adomeit, *"Hines v. Anchor Motor Freight:* Another Step In The Seemingly Inexorable March Towards Converting Federal Judges (And Juries) Into Labor Arbi-

trators Of Last Resort," 9 Conn. L. Rev. 627, 648 (1977), the commentator states:

> The price of perfect justice is high, and if the courts want to redetermine the guilt of persons discharged for alleged wrongdoing and found to be in the wrong by arbitrators, then discharge arbitration will no longer be final and binding.

The Ninth Circuit Court of Appeals, in effect, vacated Arbitrator Kagel's decision even though no one lied at the arbitration hearing and only witnesses for the Union testified. As a result of the Court of Appeals decision, the mere allegation in a complaint that one of the parties (or indeed an unknown agent of one of the parties) lied during the investigation of a grievance will be sufficient to invoke the power of the federal courts. The dispute, whether or not there was a lie, necessarily will be immune from dismissal and summary judgment. The Court of Appeals' decision, therefore, creates a dangerous doctrine of judicial intrusion into the arbitral process. In addition, it is contrary to established law of this Court and in other Circuits.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Appendices Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4178/81-4351
DC No. 77-2889

Roni K. Dogherra,
Plaintiff-Appellee,

vs.

Safeway Stores, Inc.,
Defendant-Appellant.

[Filed June 21, 1982]

OPINION

Appeals from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted January 12, 1982

Before: BROWNING, Chief Judge; SKOPIL and NORRIS, Circuit Judges

SKOPIL, Circuit Judge:

INTRODUCTION

Safeway terminated Dogherra for failing to return from leave as required. Dogherra insisted that she had notified her assistant manager, Martinez, prior to the end of her leave of her availability to work. Dogherra asked her union to file a grievance. The union dispatched investigators. Martinez allegedly told them that Dogherra had not reported for work before her leave ended. The union dropped Dogherra's grievance. Dogherra was awarded unemploy-

ment compensation, over Safeway's objection. The union sought to reopen Dogherra's grievance. At a hearing before an arbitrator, Safeway argued that Dogherra's grievance was barred by laches. The arbitrator agreed with Safeway and held the grievance non-arbitrable, stating that once the grievance was dropped, it could not be reviewed five months later. Martinez subsequently admitted that his statement that Dogherra had not reported for work before her leave ended was a lie.

Dogherra sued pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The district court held that Martinez' lie "thwarted and subverted Plaintiff's efforts to arbitrate her grievance." The district court concluded that Safeway violated the collective bargaining agreement and ordered Safeway to reinstate Dogherra and compensate her for lost wages. The district court taxed Safeway with costs and attorneys' fees of $50,305. Safeway appeals.

ISSUES

1. Did the district court clearly err in finding that Martinez was Safeway's agent when he lied to union investigators?

2. Did the district court clearly err in finding that Martinez' lie caused the union to drop Dogherra's grievance?

3. Did the district court err in holding that Martinez' lie vitiated the finality and binding effect of the arbitral decision?

4. Did the district court abuse its discretion in awarding Dogherra $50,305 in attorneys' fees and costs?

DISCUSSION

I. Agency.

A finding that one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980); *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d 834, 839 (9th Cir. 1977). The nature and extent of the agent's authority and whether apparent authority existed are also questions of fact. *Lockwood v. Wolf Corp.*, 629 F.2d 603, 609 (9th Cir. 1980); *Coast Trading Co. v. Cudahy Co.*, 592 F.2d 1074, 1978 (9th Cir. 1979).

Under section 301, determinations regarding agency are governed by common law principles. *Aguirre v. Automotive Teamsters*, 633 F.2d at 171; *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 693 (9th Cir. 1978). Actual authorization or subsequent ratification is not controlling. 29 U.S.C. § 185(e). A principal may be liable if its agent has implied or apparent authority. *Laborers & Hod Carriers Local 341 v. NLRB*, 564 F.2d at 839. Even specifically forbidden acts may be within an agent's authority. *Id.; NLRB v. ILWU Local 10*, 283 F.2d 558, 565 (9th Cir. 1960). An act is not imputed to the principal if the agent has no intention to further the principal's interests. *NLRB v. ILWU Local 10*, 283 F.2d at 565, *quoted in Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d at 693. An act is not imputed to a principal where third parties know that the agent is not speaking for the principal. *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1306 (9th Cir. 1979); *NLRB v. Sonora Sundry Sales, Inc.*, 399 F.2d 930, 935-36 (9th Cir. 1968).

Safeway contends that the district court made no finding that Martinez was Safeway's agent. This argument appears for the first time on appeal in Safeway's reply brief. We cannot say that the appellee has not been misled nor that the issue has been fully explored. Accordingly, we decline to consider it. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1331-32 (9th Cir. 1981).

Safeway also argues that no record evidence would support such a finding. Safeway concedes that Martinez, as assistant manager, was empowered to reinstate employees returning from leaves of absence. Safeway argues only that Martinez was not and could not have been seen as its agent when he lied to union investigators. Safeway notes that Martinez and Dogherra were members of the same union. Safeway also argues that it did not tell Martinez to lie nor did it know what Martinez told the union investigators.

When the union investigators sought to ascertain whether Dogherra had reported for work, they spoke to Martinez precisely because Safeway had empowered him to reinstate employees returning from leaves of absence. We cannot say that the district court clearly erred in finding that Martinez was Safeway's agent for purposes of arranging for Dogherra's return from leave.

The agency is not necessarily vitiated even if Safeway did not tell Martinez to lie nor know what Martinez told the union investigators. As noted above, even acts specifically forbidden by the principal may be within the scope of the agent's authority. *E.g., NLRB v. ILWU Local 10*, 283 F.2d at 564-65. Martinez stated that he understood that Safeway did not want Dogherra as its employee. He felt

that lying to the union investigators would help attain Safeway's goal. He intended to further Safeway's interests. His conduct is therefore chargeable to Safeway.

II. The Decision to Drop the Grievance.

The reason the union dropped Dogherra's grievance is a fact question, reviewed under the clearly erroneous standard.

Safeway conceded that Martinez told a union investigator that Dogherra had not reported for work. Safeway argues that Martinez made this statement after the union had dropped Dogherra's grievance and was deciding whether to reopen it. This argument appears for the first time in Safeway's reply brief on appeal. Dogherra has not had an opportunity to meet it. We decline to consider it. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d at 1332; *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981).

Safeway also argues that factors other than Martinez' statement led the union to drop Dogherra's grievance. There was evidence that Dogherra's failure to obtain a medical release did not cause the union to drop her grievance. The district court was justified in concluding that Martinez' statement had a greater effect on the union investigators than the fact that other store employees had no recollection of the occurrences. The district court did not clearly err in deciding Martinez' conduct was the determinative factor behind the union's decision to drop the grievance. No doubt had Martinez volunteered the truth during the initial investigation. Dogherra's claim would have been strong, and it seems highly probable that the union would have pursued the grievance.

III. Repudiation of the Arbitral Process.

The parties collective bargaining agreement specified arbitration as the preferred method of dispute resolution. As a result, we will not disturb an arbitration award "except on the grounds of fraud, deceit, or breach of the duty of fair representation or unless the grievance proceduce was a 'sham, substantially inadequate or substantially unavailable,'" *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981) (quoting *Harris v. Chemical Leaman Tank Lines*, 437 F.2d 167, 171 (5th Cir. 1971)). Fraud is also a ground for vacating an arbitral award under the Federal Arbitration Act. 9 U.S.C. § 10(a). Neither the Supreme Court nor this court has ever held the Federal Arbitration Act applicable to arbitration of labor disputes. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 466-67 (1957) (Frankfurter, J., dissenting); *Local 1020, United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d 1285, 1289-90 (9th Cir. 1981); *Local 13, ILWU v. Pacific Maritime Ass'n*, 441 F.2d 1061, 1064-65 & n.5 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972). Because fraud is a ground for vacating an arbitral award under either the Federal Arbitration Act or the federal common law fashioned from the policy of the national labor laws under the authorization of *Textile Workers v. Lincoln Mills*, 353 U.S. at 457, we need not decide whether the Federal Arbitration Act governs labor arbitrations. *See Local 1020, United Brotherhood of Carpenters v. FMC Corp.*, 658 F.2d at 1295; *Service Employees Int'l Union, Local 36 v. Office Center Services*, 670 F.2d 404, 406-08 & n.6 (3d Cir. 1982); *General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 579 F.2d 1282, 1294 & n.9 (5th Cir. 1978) (en banc), *cert. dismissed*, 441 U.S. 957 (1979).

Obtaining an award by perjured testimony constitutes fraud. *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 598 (3d Cir.) (dictum), *cert. denied*, 393 U.S. 954 (1968); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981); *Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d 32, 34-35 (2d Cir. 1951) (assuming without deciding the question) (construing 9 U.S.C. § 10(a)). Accordingly, intentionally giving a false statement to union investigators causing them to drop the grievance until after it was time-barred also constitutes fraud. Congress anticipated "that the contractual machinery would operate within some minimal levels of integrity." *Hines v. Anchor Motor Freight*, 424 U.S. 545, 571 (1976).

Yet in order to protect the finality of arbitration decisions, courts must be slow to vacate an arbitral award on the ground of fraud. *E.g., Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d at 598. The fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration. *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d at 313. The fraud must materially relate to an issue in the arbitration. *Id.* The fraud must be established by clear and convincing evidence. *See Karppinen v. Karl Kiefer Machine Co.*, 187 F.2d at 34. *Compare England v. Doyle*, 281 F.2d 304, 309-10 (9th Cir. 1960) (construing Fed.R.Civ.P. 60(b)); *Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981) (same).

The arbitrator ruled the grievance non-arbitrable because the union had dropped the grievance five months earlier. The district court found the union had dropped the grievance because of Martinez' lie. Hence, the fraud was material to laches—the only issue arbitrated. The

parties did not argue, and the district court did not decide, whether the fraud was reasonably discoverable prior to the arbitration. And although the court found fraud, it did not state whether it had been proven by clear and convincing evidence. Accordingly, we must remand to the district court for further proceedings on these points.

Although courts have power to remand cases to an arbitration panel in certain circumstances under the Federal Arbitration Act, 9 U.S.C. §§ 10(e), 11, as well as under the federal common law governing labor arbitrations, *see Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 307-308 (9th Cir. 1965); *UMW District No. 5 v. Consolidation Coal Co.*, 666 F.2d 806, 811 (3d Cir. 1981); *Burkart Randall v. Lodge 1076, IAM*, 658 F.2d 462, 468 (7th Cir. 1981), we need not decide whether ordinarily remand should be required upon the district court's finding that fraud vitiated the arbitral ruling. Remand would serve no purpose here. A finding of fraud by Safeway would necessarily imply Dogherra was wrongfully discharged, for both questions turn upon the same issue of fact—*i.e.*, whether Dogherra timely informed Martinez that she was available for work. Therefore, should the district court find for Dogherra on the question of fraud, it must also enter judgment for her on the merits.

IV. Attorneys' Fees.

A prevailing litigant ordinarily may not collect attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). A court may assess attorneys' fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id.* at 258-59 (quoting *F.D. Rich Co. v. United States ex rel.*

Industrial Lumber Co., 417 U.S. 116, 129 (1974)). "Bad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, 412 U.S. 1, 15 (1973), *quoted in Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). An award of attorneys' fees for bad faith "is punitive and the penalty can be imposed 'only in exceptional cases and for dominating reasons of justice.'" *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. Moore, *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1972)). *Accord, Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981). Within these guidelines, an award of attorneys' fees is within the district court's discretion. *See Gluck v. American Protection Industries*, 619 F.2d 30, 32 (9th Cir. 1980); *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1116-17 (9th Cir. 1979). We review a finding of bad faith under the clearly erroneous standard. *Edinburgh Assurance Corp. v. R.L. Burns Corp.*, 669 F.2d 1259, 1262 (9th Cir. 1982).

The district court found bad faith on Safeway's part because of Martinez' lie, and because Safeway pursued the action after it discovered the lie, particularly by bringing needless, almost frivolous motions. The district court did not state which motions were needless. It granted Safeway's early motions leading to the dismissal of Dogherra's pendent claims. It denied Safeway's motions for summary judgment and for reconsideration. Safeway's arguments were not precluded by precedent nor by the fact that Martinez admitted lying. Safeway did not concede that Martinez actually lied or that it knew he lied. It only concedes that Martinez *admitted* lying. Safeway contends Martinez' "admission" may have been fabricated since he and Safeway

were on bad terms. To find Safeway acted in bad faith, it would have been necessary to find that Safeway knew or believed Martinez actually lied. Absent such findings, the district court clearly erred in finding that Safeway acted in bad faith. *See Union Bank v. Winnebago Industries*, 528 F.2d 95, 99 (9th Cir. 1975).

CONCLUSION

The district court did not clearly err in finding that Martinez was Safeway's agent when he lied about Dogherra's reporting back for work, nor in finding that Martinez' lie caused the union to drop Dogherra's grievance. We must remand to the district court for a determination of whether there was clear and convincing evidence of fraud, which went to a material issue and which could not have been discovered prior to the arbitration. If the district court finds such fraud, it must rule for Dogherra on the merits as well. We reverse the district court's award of attorneys' fees, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 80-4178/81-4351
DC No. 77-2889

Roni K. Dogherra,
Plaintiff-Appellee,

vs.

Safeway Stores, Inc.,
Defendant-Appellant.

[Filed Aug. 19, 1982]

ORDER

Appeals from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and submitted January 12, 1982

Before: BROWNING, Chief Judge; SKOPIL and NORRIS, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge called for a vote on whether to rehear the case en banc pursuant to Fed.R. App.P. 35.

The petition for rehearing and suggestion for rehearing en banc are denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 77-2889 SWSJ

Roni K. Dogherra,
Plaintiff,

vs.

Safeway Stores, Inc., a California corporation,
Defendant.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND FOR CERTIFICATION OF ISSUE

This case arises out of an alleged wrongful termination. In previous rulings, and by means of voluntary dismissals, numerous claims and defendants have been dropped from this case. All that remains is a claim against plaintiff's former employer under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of a collective bargaining agreement.

BACKGROUND

Essentially, plaintiff's claim consists of an allegation that, following a permissible and authorized six month medical leave of absence, she was wrongfully terminated by defendant Safeway Stores. The reason given for her termination was that she had not informed her store of her desire to return to work within the requisite time period. Plaintiff, however, has contended all along that she told two management personnel that she wanted to return, a

Wayne Clough and an Arthur Martinez. Those two denied ever speaking to her about it.

Following plaintiff's termination, the union initiated grievance proceedings pursuant to the collective bargaining agreement. Before reaching the arbitration stage, however, the union dropped the grievance. As later explained by a union official, they had not been able to confirm a medical release from plaintiff's doctor nor had they been able to confirm her alleged conversation with Martinez.

Plaintiff also pursued unemployment insurance. At administrative hearings held in connection with her claim, Clough and Martinez testified they had not spoken to her as she alleged. Nevertheless, the agency found that she had been terminated without cause and awarded her benefits. Based on this, it seems, the union sought to reopen plaintiff's grievance proceeding. The employer objected, and the issue of arbitrability—not the merits of plaintiff's grievance—was then arbitrated. Basing his decision on concepts closely akin to the doctrine of laches, the arbitrator found that the grievance had been lost when the union originally dropped it.

Thereafter plaintiff filed this action. The union was named as a defendant but was dismissed pursuant to a stipulation by plaintiff.

On August 10, 1979, the motion of the sole remaining defendant, Safeway Stores, for summary judgment came on for hearing. That motion was based on defendant's contention that, because plaintiff does not allege her union breached its duty of fair representation, she is bound by the arbitration award previously issued in defendant's favor and this court has no jurisdiction to consider her

breach of contract claim. The motion was denied. Defendant has now moved for reconsideration of that ruling or, in the alternative, for certification of the issue for interlocutory appeal pursuant to 23 U.S.C. § 1292(b). For the reasons given below, both motions are denied.

THE MOTION FOR RECONSIDERATION

Congress historically has placed great emphasis on grievance procedures provided in collective bargaining agreements as the preferred means of resolving contract disputes. The Supreme Court has acknowledged this legislative intent in cases such as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976), and *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566, 569 (1960). Plaintiff argued at the August 10, 1979 hearing, however, that the arbitration award against her does not bar the present action because it was the product of employer wrongdoing. The alleged factual basis for this charge is contained in deposition testimony given by Arthur Martinez on May 25 and August 1, 1978. Martinez admitted that he had been lying throughout the administrative and grievance proceedings, and he now claims that plaintiff did in fact speak with him and Clough concerning reinstatement within the required time period. The union investigator is one of the persons to whom Martinez claims he lied. As the arbitrator himself observed in ruling that the union had delayed too long in pressing plaintiff's grievance, a major factor underlying the union's decision to drop the grievance originally was its inability to verify plaintiff's claim that she had spoken with Martinez and Clough. Neither the arbitrator nor the union representatives themselves could have known at the time of the arbitration hearing that Martinez would later admit to

lying to union investigators. Inasmuch as the arbitrator's decision was based on equitable considerations, plaintiff argued that he would not have ruled the union delayed too long in advancing her grievance had he determined that willful falsehoods by management personnel were responsible for that delay. In any event, plaintiff contended the actions of the employer's agent undermined the integrity of the contractual grievance procedures to such an extent that the arbitration award should not bar her from challenging her discharge in this court.

Defendant replied to plaintiff's arguments by contending that Martinez's claimed lie was irrelevant: plaintiff must, in defendant's opinion, still allege and prove the union breached its statutory duty of fair representation before the arbitration award in favor of the employer may be disregarded. Defendant's position, therefore, was that this court was deprived of jurisdiction over plaintiff's breach of contract claim against her employer when she agreed to have the union, which was once named a defendant in this action, dismissed.

At the August 10, 1979 hearing the court ruled in favor of plaintiff, accepting her argument that the employer may not invoke the bar of finality when its misconduct has interfered with the proper operation of the contractual grievance processes. Defendant's motion for reconsideration is based on a recent Ninth Circuit opinion, *Ness v. Safeway Stores, Inc.*, 598 F.2d 558 (9th Cir. 1979), which purportedly is contrary to this court's August 10th ruling.[1]

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[1]It is perhaps worth noting that the *Ness* case had actually been available for almost two months when last August's hearing was held, as it was issued on June 13, 1979.

In addition to citing *Ness*, defendant now strenuously contends plaintiff had other remedies available to her: (1) a proceeding before the National Labor Relations Board based on a charge of an unfair labor practice, (2) an attempt to persuade her union to reopen the contractual grievance processes, and (3) an action in federal court to vacate the arbitrator's award as one procured by fraud pursuant to section 10 of the Federal Arbitration Act, 9 U.S.C. § 10(a). Even assuming for the sake of argument that these suggested alternative courses were indeed available to plaintiff, defendant has still failed to cite any authority or offer any persuasive arguments that the availability of such alternative courses precludes or preempts an action by plaintiff under section 501 of the Labor Management Relations Act should such an action in other respects also have been open to her. The basic question for the present case remains whether claiming breach of the union's duty of fair representation is necessary to maintenance of a section 301 breach of contract action against an employer which, allegedly, has tampered with an subverted the contractual grievance processes.

In support of its position that no jurisdiction exists over the section 301 claim, defendant, as noted above, relies heavily on *Ness v. Safeway Stores, Inc.* Plaintiff places particular emphasis on the following language:

> Under 29 U.S.C. § 185, an employee may sue his union for breach of the duty of fair representation. An action for wrongful discharge also lies against the employer under § 185, *but only when the union is found to have breached its duty. Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 . . . (1976); *Vaca v. Sipes*, 386 U.S. 171 . . . (1967).

598 F.2d at 560 (emphasis supplied). *Ness*, however, did not involve any allegations of employer wrongdoing. It was

concerned solely with alleged union wrongdoing. To apply its language to section 301 suits where employer misconduct is alleged to have interfered with the union's ability properly to process an employee's grievance would be an extension of the *Ness* ruling unwarranted both by the facts of that case and by the holdings of the two Supreme Court cases *Ness* cites.

In *Vaca v. Sipes*, for instance, the Supreme Court considered the effect on a section 301 suit of a union's refusal to process a member's grievance. The Court held the failure of a wrongfully discharged employee to exhaust contractual remedies would not bar that employee from suing his former employer for breach of contract in federal court if he proves the union breached its duty of fair representation in the handling of the employee's grievance. 386 U.S. at 186. Nowhere, however, did the Court hold that this was the *only* situation in which failure to exhaust contractual remedies would not bar a section 301 suit against the employer. In fact, the Court discussed the issue as follows:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures.
>
> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 260-263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (*and*

> *there may of course be others*), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Id. at 185 (emphasis supplied).[2] Though not a formal repudiation within in [sic] the technical meaning given that term by contract law, an employer's lying to union investigators certainly constitutes an implied repudiation of the grievance process within the common definition of the word, and such a situation is, in this court's view, one of the "others" to which the *Vaca* Court referred. As the Court in *Vaca* itself observed, a case involving a union's breach of its duty is merely "*another situation* when the employee may seek judicial enforcement of his contractual rights." *Id.* (emphasis supplied). Moreover, the Court acknowledged, "It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement." *Id.* at 185. The clear implication here is that an even stronger case for disregarding the defense of failure to exhaust is presented when the employer interferes with the proper functioning of the contractual grievance procedures.

Hines v. Anchor Motor Freight, Inc. is in accord with this reading of the *Vaca* decision. In *Hines* the Court held that an employee is not bound by an adverse arbitral decision resulting from a process which had fundamentally malfunctioned due to union breach of duty. As in *Vaca*,

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[2] Although much of *Vaca* is dicta, *see* 386 U.S. at 199-202 (Fortas, J., concurring), the Ninth Circuit has indicated that it agrees with *Vaca's* discussions relating to section 301 actions against employers. *Clayton v. ITT Gilfillen*, Nos. 77-2756, 77-2763, Slip Op. at 3356 n. 3 (Sept. 4, 1979); *Margetis v. Pam Pam Corp.*, 501 F.2d 179, 180 (9th Cir. 1974).

though, the Court in *Hines* does not hold that the union's breach of duty is a necessary prerequisite to maintenance of a section 301 action where remedies are provided by contract; it holds only that such a breach is a sufficient basis for disregarding the normal rules of finality applicable to such grievance proceedings. *See* 424 U.S. at 572. Also as in *Vaca*, there is language in *Hines* strongly suggesting that employer interference with the grievance procedures is an easier case for disregarding an award in the employer's favor than the case actually considered, that of union misconduct. *See, e.g.*, 424 U.S. at 569 ("Anchor would have it that petitioners are foreclosed from judicial relief unless some blameworthy conduct on its part disentitles it to rely on the finality rule."); *id.* at 570 ("Under the rule announced by the Court of Appeals, unless the employer is implicated in the Union's malfeasance or has otherwise caused the arbitral process to err, petitioners would have no remedy against Anchor even though they are successful in proving the Union's bad faith, the falsity of the charges against them, and the breach of contract by Anchor by discharging without cause.").

The *Hines* Court concluded, "Congress has put its blessing on private dispute settlement arrangements provided in collective agreements, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity." *Id.* at 571. There is nothing in *Hines* to indicate the Court's broad statement regarding the legislature's intent is not equally applicable to the situation in which it is action of the employer—and not that of the union—which "seriously undermines the integrity of the arbitral process." *Id.* at 567. None of defendants' authorities are to the contrary. In fact, defendant has failed to come forward with any cases upholding arbi-

tration awards where the employer subverted the grievance process. The logic of *Hines* seems clear and unmistakable and, what is more, it is consistent with common sense. An artful liar should not be allowed to succeed in thwarting an employee's attempt to raise a grievance simply because the liar is the employer and not the union. Such a result would be unfair to the employee, contrary to congressional intent, and the utmost foolishness.

Therefore, it is the ruling of this court that if plaintiff proves the alleged lie to union investigators undermined the integrity of the arbitration process and that the liar or liars were agents of defendant, then the arbitrator's decision may be disregarded and plaintiff's breach of contract claim may be heard in this court on the merits. Defendant's motion for reconsideration is denied.

THE MOTION FOR CERTIFICATION OF ISSUE

Defendant has moved for an order pursuant to 28 U.S.C. § 1292(b) certifying for interlocutory appeal the issue of this court's jurisdiction over plaintiff's section 301 claim. It is not, however, the opinion of this court that this is an issue upon which "a substantial ground for difference of opinion" exists, nor does it appear that an "immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The ultimate resolution of this dispute will be served best by proceeding with trial as presently scheduled. Defendant's motion for certification of issue is denied.

IT IS SO ORDERED.

Dated: 1/22/80

/s/ SPENCER WILLIAMS
United States District Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 77-2889 SWSJ

Roni K. Dogherra
Plaintiff,

vs.

Safeway Stores, Incorporated,
a California corporation,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having tried the above-entitled action without jury and having heard the testimony of witnesses, reviewed the documentary exhibits submitted into evidence and considered the arguments and briefs of counsel, hereby makes the following Findings of Fact and Conclusions of Law.

I
FINDINGS OF FACT

(1) Plaintiff RONI K. DOGHERRA (hereinafter "Plaintiff") is an individual residing in Santa Cruz, California, which is within the jurisdiction of the United States District Court for the Northern District of California.

(2) Defendant SAFEWAY STORES, INCORPORATED (hereinafter "Defendant") is a corporation incorporated in the State of Maryland and licensed to do business in the State of California.

(3) Plaintiff was an employee of Defendant from June 3, 1974, to June 30, 1976.

(4) Plaintiff's employment by Defendant was covered by a collective bargaining agreement entered into by Retail Clerks Union Local No. 839 and Defendant, on or about June 1, 1974, and said agreement terminated on or about February 26, 1977.

(5) The collective bargaining agreement required Defendant to restore an employee who had been granted a non-occupational leave of absence for a period of six months to employment with the company with full seniority to a position comparable to the one held immediately prior to such leave of absence.

(6) Pursuant to the collective bargaining agreement in effect, Defendant granted Plaintiff a leave of absence for a period of six months, commencing on or about December 2, 1975, and terminating on or about June 2, 1976.

(7) During the months of May, 1976, and June, 1976, Arthur Martinez was the assistant manager of Safeway Store No. 904 located in Capitola, California.

(8) Plaintiff contacted Defendant's management personnel, specifically Arthur Martinez, prior to June 2, 1976, and informed him of her availability to return to work after her leave of absence and requested to be scheduled for work.

(9) Plaintiff was not scheduled for work by Defendant.

(10) Plaintiff was formally terminated from employment by Defendant on June 30, 1976, for the stated reason that she "did not return from six month non-occupational leave of absence within six month date."

(11) Defendant's employee, Arthur Martinez, told Plaintiff's union representatives who were investigating Plaintiff's grievance that Plaintiff had not contacted him prior to the expiration date of her leave of absence about returning to work upon the expiration of her leave of absence. He later testified under oath to the same effect before the State of California Unemployment Compensation Appeals Board.

(12) Plaintiff's Board of Adjustment proceedings were dropped because of the untruthful statements that had been made to them by Defendant's employee, Arthur Martinez.

(13) Defendant's employee, Arthur Martinez, later admitted to Clarence William Amos, a union representative of Plaintiff's, that he lied concerning Plaintiff's contacting him prior to June 2, 1976, of her availability and desire to return to work after her leave of absence, and so testified under oath in a deposition and before this Court.

(14) Plaintiff was wrongfully terminated from her employment with Defendant.

(15) Plaintiff has not been reinstated to her employment by Defendant and thus lost wages and pension benefits from the date of termination until now.

(16) Plaintiff has suffered a net loss of wages in the sum of $51,470.00.

(17) Plaintiff has suffered lost pension benefits in the sum of $4,986.00.

(18) Defendant, acting through its management representative, Arthur Martinez, acted in bad faith when he lied about Plaintiff's timely request to return to work and

further acted oppressively in pursuing this action after the fact of Martinez' lie became known, and particularly in bringing various needless, almost frivolous motions which had the result of unnecessarily increasing the amount of time plaintiff and her attorney were obliged to devote to this litigation.

II

CONCLUSIONS OF LAW

(1) Every conclusion of law contained in the above Findings of Fact shall be deemed to be a conclusion of law as if set forth herein as a conclusion of law. Every finding of fact contained in the following Conclusions of Law shall be deemed a finding of fact as if set forth as a finding of fact.

(2) Defendant by the untruthfulness of its employee, Arthur Martinez, in the union's investigative proceeding thwarted and subverted Plaintiff's efforts to arbitrate her grievance through a Board of Adjustment proceeding and thus the contractual machinery could not operate within the minimum level of integrity that Congress had anticipated when it put its blessings on private dispute settlement arrangements. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

(3) Defendant employer by the untruthfulness of its employee, Arthur Martinez, in the union's investigative process has caused the arbitral process to err and thus Plaintiff employee has a valid cause of action against Defendant employer. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976).

(4) Plaintiff complied with the collective bargaining agreement in effect concerning her employment by con-

tacting Defendant's management personnel prior to June 2, 1976, concerning returning to work after her leave of absence.

(5) Plaintiff was wrongfully discharged from her employment by Defendant.

(6) Defendants must reinstate Plaintiff to employment with all the rights, benefits and seniority which a comparable employee has accumulated since Plaintiff's wrongful discharge.

(7) Defendant is obligated to pay Plaintiff the sum of $51,470.00 for lost wages and the sum of $4,986.00 for lost pension benefits resulting from Defendant's wrongful discharge of Plaintiff.

(8) Plaintiff is entitled to Judgment against Defendant, and Defendant is hereby taxed with all Court costs and attorney's fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

Dated: Apr 2, 1980.

/s/ SPENCER WILLIAMS
United States District Judge

Appendix E

In the Matter of an Arbitration
between
Retail Clerks Union Local No. 839,
Salinas, California,
Complainant,

and

Safeway Stores, Inc.,
Respondent.

Re: Termination of Roni K. Dogherra
Question of Arbitrability

OPINION AND DECISION
of
SAM KAGEL, Arbitrator

August 23, 1977
San Francisco, California

ISSUE:

This case involved Roni K. Dogherra. Ms. Dogherra was terminated by the Employer.

The issue in this case is the question of arbitrability which is raised by the Company. The Union also wanted to proceed on the question of the merits of the case, but it was determined that the Arbitrator would settle the matter of arbitrability first and depending upon that decision, the Parties would be informed that a hearing could be had on the merits.

DISCUSSION:

The Record on this Case:

A letter dated July 19, 1976 from the Union to the Food Employers Council stated that the Union had completed its investigation of the discharge of Ms. Dogherra, stating "As a result, we wish to convene a Board of Adjustment to take up this matter." (Ers.Ex.1)

On August 16, 1976, a meeting was set to consider the grievance subject noted in the July 19 letter. The meeting was cancelled. John Bacon of the Food Employers Council testified he had a later conversation with Mr. Russell of the Union in which Russell stated that the case was dropped because the Union found a lack of sufficient evidence to proceed (Tr.7).

August 23, 1976, Bacon wrote a letter to Mr. Hillis of Safeway Stores stating that he [Bacon] had been advised that the grievance of Ms. Dogherra was dropped and that a Board of Adjustment meeting would not be necessary.

February 2, 1977, Bill Amos, President of the Union, wrote a letter to Mr. Hillis of Safeway requesting an immediate Board of Adjustment regarding Ms. Dogherra's case stating:

> ". . . due to the fact that new evidence has been presented on her case.
>
> "Please advise us as to the most convenient date and time for us to convene this Board of Adjustment." (Ers.Ex.3)

February 4, 1977, Hillis sent a letter to Bacon concerning Ms. Dogherra's case, enclosing a letter of February 2 from Mr. Amos (Ers.Ex.2).

February 14, 1977, Bacon addressed a letter to Amos referring to the letter that Amos had written on February 2, 1977, involving Ms. Dogherra and Mr. Bacon stated in his letter:

> "On August 23, 1976, this matter was dropped by Local 839. In a telephone conversation with Bill Russell on that date, I was advised that a Board of Adjustment would not be necessary. I am enclosing a copy of my letter to Hillis on that date confirming this fact.
>
> "In view of the above, and in view of the passage of time, it is my opinion that there is no obligation on our part to reopen this file." (Ers.Ex.5)

February 17, 1977, Thornton C. Bunch, Jr., counsel for the Union, addressed a letter to Bacon referring to Bacon's letter to Amos of February 14, 1977, in which Mr. Bunch asked that a Board of Adjustment meeting be set (Ers.Ex.6).

February 22, 1977, Bacon addressed a letter to Mr. Bunch in which he stated:

> "We are perfectly willing to have a Board of Adjustment. Our view of the issue is whether the merits of the case are grievable and/or arbitrable. We feel they aren't. You, I assume, disagree. Therefore, I suggest that the Adjustment Board step be waived and we proceed to select an arbiter. If you still want a Board of Adjustment, I will plan on having it in our offices on February 24, 1977 at 5:00 p.m." (Ers.Ex.7)

February 24, 1977, a letter from Bacon to Bunch confirmed their telephone conversation and cancelled the Board of Adjustment set for 5:00 p.m. February 24, 1977, suggesting that they exchange names and proceed to arbi-

tration. Bacon stated: "I am in no way waiving my position that this matter is not grievable and I would proceed to arbitrate the question of arbitrability." (Ers.Ex.8).

March 10, 1977, Bunch sent to Bacon the suggested names of arbitrators and the Parties agreed upon the Arbitrator in this case.

Bob E. Russell, who had been President of the Local Union at the time that the grievance was first filed, testified that he talked to Bacon on August 23, 1976, and he testified as follows in response to questions by Union counsel Bunch:

> "Q. [Union Counsel Bunch] What was the substance of that conversation [August 23, 1976 with Bacon]?
>
> "A. [Russell] Well, at that time I told John that we were investigating the case, and it looked to me from the evidence that we had that we were going to have to drop it.
>
> "And because we had requested certain information from Roni [the Grievant], and we had not received it.
>
> "Q. You had not received it as of the 23rd of August?
>
> "A. No.
>
> "Q. What information was that?
>
> "A. We wanted a doctor's release because, as I understand it, the case was for—she was off on a disability on a six-months' leave.
>
> "She had went back to notify the store, I think, the last week or sometime in June, just prior to the end of the six months.
>
> "THE ARBITRATOR: That's '76?
>
> "THE WITNESS: '76. And, she was supposed to have contacted the Assistant Manager or the Manager. I'm not sure.

"And, then I notified—had Mr. Struthers, a Business Representative, to check this out. This is prior up to this time.

"Q. [By Mr. Bunch] So far as you know, did Mr. Struthers make an investigation?

"A. Yes, and it was from his report to me that we did not have a doctor's release, which it's the policy on sick leave that you need it with Safeway.

"And let's see, I understand that the—also that the man which she was supposed to have contacted wasn't in that day. So with that information I reported to John I didn't think we had a case.

"Q. And you indicated to Mr. Bacon that the Union was dropping the grievance?

"A. That point's a little vague, Carl.

"I mean I don't know whether I actually said we were dropping it entirely or the record would show, from what I had, was not enough to proceed.

"Q. Okay. Do you know whether that conclusion or determination on the part of the Union was communicated to Dogherra in any way?

"A. I'm sure that Business Agent, Bill Struthers, was in contact with her." (Tr. 15-16)

On cross-examination by John Bacon, Russell was asked to be more detailed in his exact characterization of Ms. Dogherra's case when he spoke to Bacon on the 23rd and he responded as follows:

"Q. [By Mr. Bacon] Can you recall with a little more precision the exact characterization of your case to me on the 23rd?

"A. [Russell] I believe we were discussing a—the issue that she had been off on disability and she should have been returned to work, that we were aware of the fact that the Company policy is that they—we would have to have a doctor's release in order to

do it because we have been unable in the past for getting anybody to have an extension of sick leave.

"They took a hardnosed position on the six months.

"We needed a copy of a doctor's release because we would pick up the issue that who she notified in the store was sufficient, but in absence of that, and in—I mean—with the investigation that she actually—the person who she talked to was not in the store at the time. I didn't feel that we were going to have a case." (Tr. 17-18)

Russell testified that about that time Safeway opened a store in Monterey and the Union attempted to get a position for Ms. Dogherra in that store; that in seeking that position the Union was not seeking to have her reinstated from her leave of absence, but was trying to get her "new employment." (Tr. 19)

Bill Struthers was serving as an organizer or relief Business Representative for the Union at the time of this incident and participated in the investigation of the grievance filed by Ms. Dogherra. He testified that he spoke to Ms. Dogherra on August 12 at Cindy's restaurant in Santa Cruz and at that time she indicated she was wanting to clear her record and that she really didn't want to go back to Safeway, but that if the Union couldn't clear her record, then she wanted to go all the way with the Board of Adjustment and arbitration, if necessary, to get full reinstatement (Tr. 20).

Ms. Dogherra commenced her leave of absence on December 2, 1975 so that her leave of absence would have expired on June 2, 1976. Ms. Dogherra, according to Struthers, advised him that she had contacted some people in the store regarding her return to work and that those

contacts were made prior to June 2; that he investigated the names that Ms. Dogherra had given to him and that he couldn't find anyone who could place her in the store before June 2; that she stated she spoke specifically to Art Martinez, the Assistant Manager, and in checking, Struthers found that Martinez had been on vacation the last week of May (Tr.20-21). Thereafter, Struthers told Russell that it was his recommendation that the Union drop the case; that they couldn't come up with any evidence. At the time he met with Ms. Dogherra on August 12, he had phoned her previously asking her to bring a medical release and that he never received it. He told her that the Union would have to have it by Monday at the Board of Adjustment; that he never did get a copy of the medical release (Tr.21-22).

Ms. Dogherra testified that she met with Mr. Struthers on or about August 12 at Cindy's restaurant; that he advised her that the meeting of the Board of Adjustment had been cancelled; that they discussed the case "but to absolutely what we were discussing, no, I don't remember." (Tr.27). Yet, she denied that Struthers told her that the Union believed she had a bad case and that he (Struthers) was not able to verify the information that she had given him about who she had talked to in the store prior to June 2 (Tr.28).

SUMMARY:

This case is clear that the Parties had agreed to a Board of Adjustment meeting on the termination of Ms. Dogherra; that the meeting was cancelled by mutual agreement; that there was sufficient evidence given to the Employer that the meeting was cancelled because the Union had made an investigation and believed that it did not

have a suitable case to proceed to the Board of Adjustment. Some five months thereafter the Union sought to reconstitute a system Board of Adjustment on Ms. Dogherra's case. It must be accepted that when there is a grievance and a Board of Adjustment meeting is requested and such request is granted and the Union then drops the case, it cannot then be resurrected some five months thereafter. Such a practice would be violative of the principle that is behind all provisions dealing with the adjustment of grievances; i.e. that they should be completed within a reasonable time, that the Employer had the right to rely on the withdrawal of the case. It must be found that Ms. Dogherra was, in fact, informed that the case was not proceeding and the reasons therefor, namely, her defense that she had talked to Martinez did not check out and that she had not supplied the Union with the necessary medical release.

DECISION:

The grievance of Ms. Roni Dogherra is not arbitrable.

/s/ SAM KAGEL
Arbitrator

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-474

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

SAFEWAY STORES INCORPORATED,

PETITIONER,

VS.

RONI K. DOGHERRA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RONI K. DOGHERRA IN OPPOSITION

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No. 82-474

IN THE SUPREME COURT

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October Term, 1982

SAFEWAY STORES INCORPORATED,

Petitioner,

vs.

RONI K. DOGHERRA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RONI K. DOGHERRA IN OPPOSITION

Petitioner, who prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, contends that the courts below erred in holding that fraud by Petitioner's (employer) management personnel

was a repudiation of the arbitral process.

STATEMENT OF THE CASE

This action was brought by Respondent Roni K. Dogherra against Petitioner Safeway Stores, Incorporated as a result of the wrongful termination of Dogherra's employment with Safeway.

Dogherra's allegations, under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185), were based upon her contention that she had complied with Safeway's implied requirement that an employee on a non-occupational leave of absence had to inform Safeway, prior to the termination of the leave of absence, of the employee's availability to return to work at the completion of the leave of absence.

Safeway vehemently contested this factual issue, even in light of the unequivocal admission of its assistant store manager

that he had lied in the union investigation and the unemployment compensation appeals board hearing. He admitted that, in fact, Dogherra had informed him, prior to the end of her leave of absence, of her availability to return to work after her leave of absence and had requested to be scheduled to work. He also admitted that he had informed the store manager and the secretary at the district office of Dogherra's proper action.

STATEMENT OF FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

Respondent Dogherra was wrongfully terminated from her employment with Petitioner Safeway on June 29, 1976. She has not yet returned to that employment. Dogherra commenced employment at Safeway on June 3, 1974. On December 2, 1975, she commenced a six-month non-occupational leave of absence. On May 18, 1976,

she was released by her doctor to return to work. Prior to June 2, 1976, Dogherra reported to Arthur Martinez, the assistant manager at the Safeway store where Dogherra worked and informed him of her availability to return to work after expiration of the leave of absence and requested to be scheduled for work.

Dogherra was not scheduled to work. She telephoned and visited the Safeway store to determine why she was not on the work schedule. She was told by the store manager that she would be put back on the work schedule just as soon as he could get the schedule "straightened out". However, on June 29, 1976, Dogherra was terminated as Safeway claimed that she had failed to properly report for employment from a six-month non-occupational leave of absence.

Dogherra disputed the reason for termination and immediately contacted her

union, Retail Clerks Union Local 830, and requested aid. The union initiated an investigation into the matter and requested that a Board of Adjustment be convened pursuant to the terms of the Collective Bargaining Agreement. When the union investigator contacted Martinez, the Safeway assistant manager, Martinez blatantly lied and told the investigator that Dogherra had not contacted him about returning to work. In fact, as later admitted by Martinez, Dogherra had reported, and Martinez had informed the Safeway district office and the Safeway store manager that Dogherra had properly reported for work. As the union could not get anyone in the Safeway store where Dogherra had reported to support her contention, the union cancelled the first Board of Adjustment.

Dogherra had also applied for unemployment insurance benefits. At the hearing

before the administrative law judge, Martinez and the store manager denied that Dogherra had informed Martinez prior to June 2, 1976, of her availability to work after her leave of absence and of her request to be scheduled for work. Thus, benefits were denied. However, the California Unemployment Insurance Appeals Board on January 18, 1977, reversed the initial decision, finding that Dogherra had communicated her intention to return to work before the expiration of her leave of absence.

Motivated by Dogherra's urgings and the success of the decision of the California Unemployment Insurance Appeals Board, the union again investigated the facts. The president of Local 830 went to the Safeway store where Dogherra had been employed and again was told by both the manager, and Martinez, the assistant manager, that Dogherra had not reported

for employment on a timely basis. However, as Dogherra was adamant, the union proceeded with a request for a Board of Adjustment.

An arbitration was convened on July 12, 1977. The union wanted to proceed on the merits of the case. Safeway refused and stated through its representative that it would not proceed with any arbitration on the merits. The exchange was as follows:

> THE ARBITRATOR: Well, then I gather the case is submitted on the matter of arbitrability?
>
> MR. BUNCH (union representative): Yes.
>
> THE ARBITRATOR: The union wants to proceed on the question of merits and the company does not, as I gather the respective positions.
>
> MR. BUNCH: Right.
>
> MR. BACON (Safeway representative): The company will not.
>
> THE ARBITRATOR: Aside from whether you will or you won't?
>
> MR. BACON: I do not and will not.
>
> THE ARBITRATOR: OK. That means that the records should indicate

> that in this kind of a case I will have to decide the question of arbitrability first . . . .

The arbitrator, deciding only the questions of arbitrability, reached the decision that the Dogherra grievance was not arbitrable. There was no decision on the merits. The arbitrator reasoned that the Board of Adjustment meeting had been cancelled because "the union had made an investigation and believed that it did not have a suitable case to proceed to the Board of Adjustment" (Pet. App. E, p. A-33), and that seeking to reconstitute a system Board of Adjustment in this matter some five months after scheduling the original Board of Adjustment, was violative of the principle that the adjustment of grievances should be completed within a reasonable time (Pet. App. E, p. A-34). Martinez and Clough, the Safeway store manager, were present at the arbitration, but neither testified.

As Dogherra had exhausted her remedies, this litigation was commenced and a plethora of legal paperwork followed. During discovery Arthur Martinez finally told the truth. He admitted that, when the store manager was gone and he was acting as manager, Dogherra had contacted him prior to June 2, 1976, and informed him of her availability to return to work after her leave of absence and requested to be scheduled for work. He also admitted he had informed the store manager, when he returned from vacation, that Dogherra had called and wanted to get back on the work schedule, and that he had also informed the secretary at the Safeway district office.

After all the previous lying, Martinez had pangs of conscience and approximately two-three weeks prior to his deposition of May 25, 1978, met with Robert A. Dolinko, one of Safeway's attorneys in this

litigation, and a union representative and told them the truth. He even entered a plea of no contest to a perjury charge in regard to his untruthful testimony at the California Unemployment Insurance Appeals Board hearing. Since the deposition Martinez has continued to tell the truth concerning Dogherra's reporting for work. Safeway has stubbornly refused to abide by the truth.

REASONS FOR DENYING THE WRIT

A. Any Nationwide Impact of This Case Will Be As Additional Precedent For Integrity in the Arbitral Process

The decision of the Ninth Circuit Court of Appeals in this matter merely follows established and common sense precedent in holding that "fraud is a ground for vacating an arbitral award under . . . the federal common law fashioned from the policy of the national labor laws under the authorization of Textile Workers v. Lincoln Mills, 335 U.S. 457" (Pet. App. A, p. A-6)

This holding is certainly not a threat to the national labor policy or the decisions of this Court. To the contrary, a holding, as requested by Safeway, that there be no recourse to a decision obtained by fraud would be contrary to other decisions and to national labor policy. Furthermore, the holding of the Ninth Circuit Court of Appeals that "intentionally giving a false statement to union investigators causing them to drop a grievance until after it was time-barred also constitutes fraud", (Pet. App. A, p. A-7), is certainly not contrary to any precedent.

The opinion specifically notes that "courts must be slow to vacate an arbitral award on the grounds of fraud", (Pet. App. A, p. A-7), and then sets forth the formidable criteria which must be followed: (1) The fraud must not have been discoverable upon the exercise of due diligence prior to the arbitration; (2) the fraud

must materially relate to an issue in the arbitration; and (3) the fraud must be established by clear and convincing evidence (Pet. App. A, p. A-7).

The Appellate Court's holding herein follows the decisions of a host of other courts: Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976); Castaneda v. Dura-Vend Corporation, 648 F.2d 612, 619 (9th Cir. 1981); Andrus v. Convoy Company, 480 F.2d 604, 606 (9th Cir. 1973); and Harris v. Chemical Leaman Tank Lines, 437 F.2d 167, 171 (5th Cir. 1971).

In a last gasp effort Safeway also attempts to employ the "burden on the courts" scare tactic in an attempt to avoid its fraud. Holding that parties to collective bargaining agreements must engage in fair dealing and allowing recourse for deceitful, untruthful and fraudulent conduct is not a "dangerous new doctrine" that will cause pandamonium with the

courts as Safeway suggests. It is simply a promotion of the cornerstone concepts of fair and truthful actions.

B. The Court of Appeals Was Correct in Affirming That Fraud by An Employer Is A Repudiation of the Arbitral Process

The trial court found from the evidence presented that:

> Defendant [Safeway] by the untruthfulness of its employee, Arthur Martinez, in the union's investigative proceeding thwarted and subverted Plaintiff's efforts to arbitrate her grievance through a Board of Adjustment proceeding and thus the contractual machinery could not operate within the minimum level of integrity that Congress had anticipated when it put its blessings on private dispute settlement arrangements . . . .
>
> Defendant employer by the untruthfulness of its employee, Arthur Martinez, in the union's investigative process has caused the arbitral process to err and thus Plaintiff employee has a valid cause of action against Defendant employer . . . . (Pet. App. D, p. A-24).

Safeway contends that the Appellate Court was in error in affirming the finding that fraud is a repudiation of the arbitral process.

In Vaca v. Sipes, 386 U.S. 171 (1967), this Court, mostly in dicta, established that an employee could seek justice from the courts against the employer concerning employee section 301 actions for wrongful discharge, even though contractual remedies were not exhausted. The Court reasoned as follows:

> [B]ecause these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his remedial procedures.
>
> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer

> amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action. (Id. at 185) (emphasis added).

Although Vaca v. Sipes, supra, concerned only the federal court's jurisdiction of employee causes of action against a union for failure to represent, the Ninth Circuit Court of Appeals applied the reasoning, and it is clear that under proper circumstances an employee may bring a wrongful discharge suit against an employer (Clayton v. ITT Gilfillan, 623 F.2d 563, 567n5 (9th Cir. 1980); Brannon v. Warn Brothers, Inc., 508 F.2d 115, 120 (9th Cir. 1974); Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974); and Beriauli v. Local 40, 501 F.2d 258, 262 (9th Cir. 1974)).

Safeway's reliance on Rabalais v. Dresser Industries, Inc., 566 F.2d 581 (5th Cir. 1975) and Robbins v. George W. Prescott Publishing Co., Inc., 457 F.Supp. 915 (D.Mass. 1978), appeal dismissed, 614 F.2d 3 (1st Cir. 1980), is misguided. Neither case has any showing of employer wrongdoing. In Rabalais the employee participated in the first three stages of the grievance process. Then neither the employer nor the union sought the final step of arbitration. The employer took the position that the employee's claim was not a proper one for grievance. In Robbins the plaintiff-employee soon after his discharge from employment disassociated himself from his union's efforts on his behalf even though the union and the employer remained willing to go to arbitration.

It is agreed that in neither Rabalais nor Robbins did the employer's conduct rise

to the level of repudiation. The conduct of the employers in each case is easily distinguishable from the fraudulent conduct of Safeway in this matter.

An employee has to exhaust the contractual remedies except in "those limited instances in which an employee is prevented or obstructed from exhausting grievance and arbitration procedures because of wrongful employer or union conduct" (Robbins, supra, 457 F.Supp. at p. 920) (emphasis added). That precedent applies in this case. It is absolutely clear and established by the findings of fact and conclusions of law of the trial court that Safeway, through the lies of Martinez, "prevented" and "obstructed" Dogherra from pursuing her deserved contractual remedies. The lies of Martinez to union investigators brought about the droppoing of the Board of Adjustment and caused the delay in further attempts at arbitration which

resulted in a decision that Dogherra's grievance was not arbitrable because it was not completed in a reasonable time. The entire collective bargaining arbitration procedure was subverted by the known and admitted dishonesty of the Safeway assistant manager, Martinez. This amounts to repudiation by Safeway. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976) states this reasonable logic. As interpreted by the trial court herein:

> . . . The logic of Hines seems clear and unmistakable, and, what is more, it is consistent common sense. An artful liar should not be allowed to succeed in thwarting an employee's attempt to raise a grievance . . . . Such a result would be unfair to the employee, contrary to congressional intent, and the utmost foolishness. (484 F.Supp. 396, 400-401 (N.D.Cal. 1980)).

C. The Court of Appeals' Affirmation of the Agency Issue Follows Undisputed Precedent

Whether or not an individual was or was not an agent is a question of fact

which the trier of fact decides from direct or circumstantial evidence (White Oak Company v. United Mine Workers of America, 318 F.2d 591, 599 (6th Cir. 1963). The trial court herein found that:

> Defendant, acting through its management representative, Arthur Martinez, acted in bad faith when he lied about Plaintiff's timely request to return to work . . . (Pet. App. D, pp. A-23, A-24). (emphasis added).

Safeway contends that Martinez' conduct should not be chargeable to it, the employer, and argues that the Appellate Court erred in affirming the trial court. As stated in the Ninth Circuit Court of Appeals' opinion, "A finding that one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard", citing Aguirre v. Automotive Teamsters, 633 F.2d 168, 174 (9th Cir. 1980; Laborers & Hod Carriers Local 341 v. NLRB, 564 F.2d 834, 839 (9th Cir. 1977) (Pet. App. A, p. A-3).

The issue of agency in regard to uniform labor practices under the Labor Management Relations Act is referred to in Section 301(e) (29 U.S.C. 185). It states:

> For purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 301(e) was enacted to eliminate the strict requirement for proof of authorization and ratification which the Supreme Court read into a somewhat comparable section of the Norris-LaGuardia Act in its opinion in United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395 (1947). (International Ladies Garment Workers Union v. N.L.R.B., 237 F.2d 545, 551 (U.S. App.D.C. 1956)). Congress intended

by the language of this statute to "restore the applicability of common law agency principles of responsibility . . ." (Id. at p. 551).

The major proponent of the bill made the following analysis of the agency section, 93 Cong. Record, p. 7001, Legislative History of Labor Management Relations Act vol. 2, p. 1622:

> Section 2(2), 2(13), and 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner act 'any-one acting in the interest of an employer' and inserted in lieu thereof the word 'agent'. The term agent is defined in section 2(13) and section 301 (e), since it is used throughout the unfair labor practice sections of title I and in sections 301 and 303 of title III. In defining the term the conference amendment reads 'the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the law of agency as it has been developed at common law.

> . . . Of course, the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.
>
> . . . The conferees agreed that the ordinary law of agency should apply to employer and union representatives. Consequently, when a supervisor acting in his capacity as such, engages in intimdating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless whether or not the company officials approved or were even aware of his actions
> . . . .

Therefore, the principles of common law agency are to be applied under section 301 in determining whether any person is acting as an agent. Hasbrouck v. Sheet Metal Workers Local 232, 586 F.2d 691, 693 (9th Cir. 1978). The subject of agency belongs to a relatively recent period in our law. It is derived from common law and commenced with the master-servant relationship. As historically described by Justice Oliver Wendell Holmes

in his book, "The Common Law", masters became personally liable for certain wrongs committed by their slaves. Later, shipowners and inkeepers were made liable for the wrongs committed by those in their employ even though acts were committed without their knowledge. These were the first instances of a master being made unconditionally liable for the wrongs of his servant. This principle expanded to the responsibility of the master to those he employed even though they were free and not slaves and this became the general law. (Holmes, "The Common Law" (rev. ed. 1963) p. 16-17).

"The word agency denotes the relation which exists when one person is employed to act for another" (Mechem, Outline of the Law of Agency (3rd ed. 1923) p. 6). The relationship of principle and agent "is the legal relation which exists where one person, called the agent, is employed

and authorized by another, called the principal, to represent and act for the latter in his contractual or business dealings with third persons" (Id. at p. 7).

In practical application to the field of labor law we shall be guided by the familiar rule of agency:

> . . . that a principal may be responsible for the act of his agent within the scope of the agent's general authority or the 'scope of his employment' if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowers the agent to represent him in the general area which the agent acted (Matter of Sunset Line and Levine Company, 79 NLRB No. 207). (3 Jenkins, Labor Law, (2nd ed. 1969) p. 11-12).

Martinez was the assistant manager of the Safeway store where Dogherra was employed. Martinez had authority to receive the information from Dogherra that she was ready to return to work. Martinez was empowered to represent the

store in dealing with other employees. He was undoubtedly the agent of Safeway.

Also, in closing on this issue, this Court's review should be closely analogous to the decisions in N.L.R.B. v. Pacific Southwest Airlines, 550 F.2d 1148 (9th Cir. 1977) and N.L.R.B. v. L.B. Foster Company, 418 F.2d 1 (9th Cir. 1969). In these cases it was decided that once it was found that the employer "acted through" the employee and since the agency was supported by substantial evidence, then the employee's acts are attributed to the employer. The trial court in the case at bar found that Safeway "acted through" Martinez. The findings of the trial court were not to be set aside by the Ninth Circuit Court of Appeals unless they are clearly erroneous (Fed. Rules Civ. Proc. Rule 52(a) 28 U.S.C.). The acts of Martinez are attributable to Safeway.

CONCLUSION

It has been six years and four months since Roni K. Dogherra was wrongfully and fraudulently terminated from her employment as a journeyman clerk with Safeway. She continued to battle through the administrative and legal requirements and finally received a hearing on the merits by obtaining a trial in the District Court. In that trial the truth was obtained and, she was awarded a judgment in her favor. Furthermore, the District Court found that Safeway, though its agent, acted in bad faith and "further acted oppressively in pursuing this action after the truth was known and particularly in bringing needless, almost frivolous motions which had the result of unnecessarily increasing the amount of time plaintiff and her attorney were obliged to devote to this litigation." (Pet. App. D, p. A-24). The oppression

continues. The time plaintiff and her attorney are obliged to devote to this litigation continues, also.

There is no error by the Ninth Circuit Court of Appeals in the issues argued by Safeway. The opinion does not create a dangerous doctrine. It does require fair dealing and truthfulness by the employer in disputes with employees. To find otherwise would be dangerous doctrine.

> Congress has put its blessing on private dispute settlement arrangements provided in collective agreement, but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity. (Hines v. Anchor Motor Freight, Inc., supra, 424 U.S. 554 at p. 571).

This requirement must be perpetuated.

The Petition for Writ of Certiorari should be denied.

DATED: OCT 12 1982

Respectfully submitted,

COTCHETT, DYER & ILLSTON

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PROOF OF SERVICE BY MAIL
PURSUANT TO 28 U.S.C.
and C.C.P. §§ 1013(a), 2015.5

I am a citizen of the United States; my business address is Bank of California Building, 4 West Fourth Ave., Suite 500, San Mateo, California, 94402; I am employed in the County of San Mateo, where this mailing occurs; I am over the age of eighteen (18) years and not a party to the within cause. I served the within MEMORANDUM FOR RONI K. DOGHERRA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on the following persons on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mailbox in San Mateo, California, adressed as follows:

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I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on October 12, 1982, at San Mateo, California.

Shirley Buchignani
SHIRLEY BUCHIGNANI